SING KEE MOTOR CREDIT SDN BHD

v.

PUBLIC FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
DENIS ONG JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: N-02-466-1996]
29 SEPTEMBER 2000

CIVIL PROCEDURE: *Action - Res judicata - Proceedings arising out of termination of agreement - Validity of termination notice not challenged in earlier proceedings - Whether party estopped from relying on it in subsequent proceedings alleging termination was unlawful*

CONTRACT: *Breach - Elect to continue with contract - Continuing obligation to pay money - Whether acceptance of late payments a waiver of right to terminate - Whether time of the essence*

The appellant ('SK'), a second-hand car dealer, and the respondent ('PBF'), a finance company, entered into an agreement whereby PBF would provide credit facilities to customers of SK, and SK would collect and pay to PBF all sums payable under the respective hire purchase agreements ('the agreement'). PBF subsequently terminated the agreement by notice dated 25 July 1985 ('the termination notice'), on the ground that SK had on numerous occasions failed to remit the payments punctually resulting in notices of claim and reminders being issued to SK. PBF filed an action in 1986 for recovery of the moneys owing, but the action was settled.

Subsequently in July 1989, SK brought an action against PBF in the High Court for breach of contract arising out of the termination of the agreement. The issues for determination were: (i) whether time was of the essence of the contract; and (ii) whether SK was estopped from bringing its action as a result of the earlier proceedings by PBF. The High Court dismissed SK's action and SK appealed.

Held:
Per Haidar Mohd Noor JCA

[1] The trial judge was correct in finding that the agreement had been properly terminated as time was of the essence of the contract and furthermore, cl. 9(f) of the agreement stipulated that any forbearance by PBF in allowing for late payments did not prejudice its rights under the agreement.

[2] Both the present action by SK and PBF's previous suit were founded on the termination notice. As the validity of the termination notice could have been raised in the earlier proceedings, it was not open to SK to rely on it in the present proceedings. SK was therefore estopped from denying the validity of the termination of the agreement.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu ('SK'), peniaga kereta terpakai, dan responden ('PBF') sebuah syarikat kewangan, telah memasuki satu perjanjian di mana PBF akan memberikan kemudahan-kemudahan kredit kepada pelanggan-pelanggan SK dan SK akan mengutip dan membayar kepada PBF kesemua jumlah yang kena dibayar di bawah perjanjian-perjanjian sewa-beli masing-masingnya ('perjanjian tersebut') PBF telah menamatkan perjanjian tersebut melalui notis bertarikh 25 Julai 1985 ('notis penamatan tersebut') atas alasan bahawa SK telah beberapa kali gagal untuk membayar pembayaran-pembayaran tersebut secara tetap yang menyebabkan notis-notis tuntutan dan peringkatan dikeluarkan kepada SK. PBF telah memfailkan satu tindakan dalam tahun 1986 untuk memperolehi semula wang yang terhutang, tetapi tindakan tersebut telah diselesaikan.

Kemudiannya dalam bulan Julai 1989, SK telah memulakan satu tindakan terhadap PBF dalam Mahkamah Tinggi kerana kemungkiran kontrak yang berbangkit daripada penamatan perjanjian tersebut. Isu-isu untuk penentuan adalah: (i) samada masa merupakan intipati kontrak; dan (ii) samada SK diestop daripada memulakan tindakannya akibat prosiding yang lebih awal oleh PBF. Mahkamah Tinggi menolak tindakan SK dan SK merayu.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Hakim perbicaraan adalah betul dalam memutuskan bahawa perjanjian tersebut telah ditamatkan dengan betul kerana masa merupakan intipati kontrak dan lagipun, fasal 9(f) perjanjian tersebut menentukan bahawa sebarang kesabaran oleh PBF dalam membenarkan pembayaran lewat tidak memudaratkan haknya di bawah perjanjian tersebut.

[2] Kedua-duanya tindakan semasa SK dan guaman terdahulu PBF adalah berasaskan notis penamatan tersebut. Oleh kerana kesahihan notis penamatan tersebut sepatutnya telah dibangkitkan dalam prosiding yang lebih awal, ianya tidak terbuka kepada SK untuk bergantung padanya dalam prosiding semasa. SK adalah dengan itu diestop daripada menafikan kesahihan penamatan perjanjian tersebut.

[Rayuan ditolak dengan kos.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(foll)***

Greenhaigh v. Mallard [1947] 2 All ER 255 ***(foll)***

Hicks v. Gardner 1 Juv 541 ***(refd)***

Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 ***(foll)***

Leeds and Hanley Theatre of Varieties v. Broadent [1898] 1 Ch 343 ***(refd)***

OCBC Bank (M) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 ***(foll)***

For the appellant - D Krishna; M/s Krishna Dallimah & Co

For the respondent - Phillip Chai; M/s Soo Thien Meng & Nashrah

[Appeal from High Court, Seremban; Civil Suit No: 22-124-89]

Reported by Anne Khoo

JUDGMENT

Haidar Mohd Noor JCA:

In this appeal the appellant, Sing Kee Motor Credit Sdn Bhd ("5K"), as the plaintiff, sued the respondent, Public Finance Berhad ('PFB'), as the defendant, in the High Court for breach of contract and for damages. The learned High Court judge after a full trial dismissed SK's action with costs and hence the present appeal by SK before us.

Brief Facts

SK is involved in second-hand car business and provides credit facilities whereas PFB, a finance company, provides credit facilities to SK in its business.

Both parties executed an agreement known as "Hire Purchase Agency Facility" on 6 May 1982 ("agreement"). Clause 9(a) of the agreement, *inter alia*, imposes the obligations of SK as a dealer by way of a guarantee and indemnity to include:

> The Dealer undertakes to collect and pay on behalf of hirers and remit **punctually** on specified dates, all sums payable under each and every hire purchase agreement introduced by the Dealer. (emphasis added)

PFB claimed that SK had on a number of occasions failed to remit the payments punctually resulting in PFB issuing notices of claim and reminders to SK. Following that PFB, through its solicitors, issued a letter dated 25 July 1985 to SK terminating the agreement and claimed a sum of RM43,655 as due and outstanding. However, SK contended that it was willing to pay the claim of PFB on the basis that time was not of the essence of the contract. In that event SK claims that the termination of the agreement by PFB was in breach of the agreement.

Counsel for both parties agreed that there are two issues for determination. They are:

(1) whether time was of the essence of the contract;

(2) whether the plaintiff was estopped as a result of the earlier proceedings taken by PFB against SK *vide* Civil Suit No. 24-188-86 in the High Court, Seremban. This suit is over the same contract and it was settled.

The learned judge also confined to the above two issues in his judgment.

Issue (1)

The learned judge in considering this issue went on the premise that time was of the essence of the contract. He came to this finding as cl. 9(a) of the agreement stipulates that SK is required to make payment of the rentals "punctually" and cited *Leeds and Hanley Theatre of Varieties v. Broadent* [1898] 1 Ch 343; *Hicks v. Gardner* 1 Juv. 541 in support thereof. It is not disputed by SK that payments were not made punctually by it to PFB except that it was made to pay interests for the late payments though not provided for by the agreement. However, the payment of interests is not an issue here as it was made without any protest by SK.

In the appeal before us, counsel for SK conceded that time was of the essence of the contract. This would be contrary to the pleaded case of SK as by para. 7 of the statement of claim, it is plainly pleaded by SK that time was never of the essence of the contract. It would be too late for SK to change its position before us. With respect, SK should have pleaded that time was of the essence of the contract (as so pleaded by PFB in para. 6 of the statement of defence) and to aver that there was waiver on the part of PFB by not taking an early action to terminate the agreement when payments were not made punctually by SK.

In any event, the indulgence or forbearance on the part of PFB in allowing for late payments of the rentals by SK shall not prejudice or affect PFB's rights by virtue of cl. 9(f) of the agreement executed and agreed to by both parties. Clause 9(f) reads:

> This guarantee shall be a continuing guarantee and the Company's rights hereunder shall not be prejudiced or affected by any indulgence or forbearance on their part extended to the Dealer or to any parties the subject hereof or by the death, bankruptcy, liquidation or insolvency of the Dealer.

PFB by way of para. 4 of the statement of defence averred that it had been constrained to grant forbearance repeatedly until termination of the agreement as a result of the breach.

By virtue of cl. 20 of the agreement PFB rightly terminated the agreement as held by the learned judge. We agree.

Issue (2)

In the present action by SK, the alleged breach of the agreement by PFB is founded on the notice of termination dated 25 July 1985 issued by the solicitors for PFB. It is to be noted that in the earlier Civil Suit No. 24-188-86 by PFB against SK, PFB's action is founded on the same notice of termination. In the said suit SK did acknowledge receipt of the said notice but averred that it did not neglect or fail or refuse to pay to PFB the sum of RM48,662.89 or any part thereof. It is to be noted, however, that SK did not at any time respond or dispute to that part of the notice regarding the termination which reads:

> **TAKE NOTICE** that as a result of your aforesaid breaches our client shall **henceforth** treat the said Master Agreement dated 6.5.1982 as terminated and our client shall collect all arrears of and future rentals due directly from the individual hirers. (emphasis added)

PFB thereafter proceeded to collect the rentals directly from the hirers.

As SK neglected to pay the sum of RM48,662.89 as per the said notice, PFB filed an action on 18 March 1986 for the recovery only of RM96,010.64 (inclusive of RM48,662.89) as the sum due on 30 November 1985 *vide* Civil Suit No. 24-188-86 against SK and the three guarantors. As SK did not at any time dispute the termination, PFB obviously confined its action against SK only for the monetary claim, *ie* the rentals due. Nowhere in its defence to the action by PFB did SK dispute the legality of the termination notice. If it intended to dispute it then SK should have so pleaded in its defence but it merely acknowledged receipt of the termination notice and denied its contents. That was the best opportunity for SK to vindicate its position as to the legality of the termination of the agreement. In the subsequent correspondence between the parties, SK was aware of the termination of the agreement and would appear to have accepted it (see p. 428, 429 and 430 of the Appeal Record). We reproduce hereunder the relevant correspondence between the parties:

28th August 1986

The Manager
Sing Kee Motor Credit Sdn Bhd
59 1st Floor Jalan Tuanku Antah
70100 Seremban.

Dear Sir,

Hire Purchase Agency account (terminated)

We write to inform you that we have utilised a sum of $23,066.10 from the dealer's commission payable to you (before termination of Master agreement) retained by us, to effect against the following accounts.

...

Yours faithfully
For PUBLIC FTNANCE BERHAD

xxx sgd. xxx
Gan Cheng Huat
Manager

GCH/../..

cc. The Manager
Public Finance Berhad
Credit Control Department
4th Storey South Block
Wisma Selangor Dredging
Jalan Ampang
50450 Kuala Lumpur.

SENG KEE MOTOR CREDIT SDN. BHD.
59, 1st Floor, Jalan Tuanku Antah, (Jalan Rahang) 70100 Seremban, N.S.
TEL: 717318 & 720895

Date: 26th September 1986.

ATTENTION MR LEE

Public Finance Bhd
No. 124 Jalan Dato Bandar Tunggal 70000
Seremban
N.S.

Dear Sir,

Re: Hire Purchase Accounts (Terminated)

With reference to your letter dated 28th August 1986, on Item (iii) kindly furnish us in detail, as enable us to finalise.

Xxx sgd. Xxx

Finally Civil Suit No. 24-188-86 was settled and PFB filed a notice of discontinuance and served a copy of it on the solicitors for SK.

For reasons best known to SK, it decided after a lapse of about one and a half years after the settlement of Civil Suit No. 24-188-86 to file the present action, the subject matter of the appeal before us on 14 July 1989, alleging that the notice dated 25 July 1985 was in breach of the agreement as time for payment was never of the essence of the contract and thereby claims for damages against PFB. As we have said earlier, the issue of the validity of the termination of the agreement could have been raised in the earlier proceedings, it is now not open to SK to rely on it in the present proceedings. The issue arose out of the same notice in the earlier proceedings by PFB though confined to monetary claims only as SK did not raise the legality of the notice of termination as an issue. This court in *OCBC Bank (M) Bhd. v. Kredin Sdn. Bhd.* [1997] 2 CLJ 534 held that the respondent should be shut out from raising in a subsequent action an issue which it could, and should, have raised in earlier proceedings. In this respect, this court in *OCBC*'s case quoted at p. 552 with approval what Somervell LJ said in *Greenhaigh v. Mallard* [1947] 2 All ER 255 at p. 257:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... It covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceedings to be started in respect of them.

The above passage was also quoted with approval by our then Supreme Court in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn. Bhd.* [1995] 3 CLJ 783 (see also the Federal Court case of *Kluang Wood Products Sdn. Bhd. & Anor v. Hong Leong Finance Bhd. & Anor* [1999] 1 CLJ 1).

By way of paras. 9 and 10 of the statement of defence PFB clearly set out in detail of the settlement of the earlier suit and that SK is estopped from denying the validity of the termination of the agreement.

In our view the learned judge was correct in holding that the action by SK against PFB is clearly an abuse of the process of the court. When we asked counsel for SK why it took one and a half years for SK to file the present action, he could not offer any explanation, and rightly so, as it clearly denotes SK's futile attempt at trying to get damages from PFB.

In the circumstances, the learned judge was correct in dismissing SK's claim and there were no grounds for us to interfere.

We dismissed the appeal with costs and ordered the deposit to be paid to PFB, the respondent, towards its taxed costs.